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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ALLEN HYMAN,

Defendant and Appellant.

C051543

(Super. Ct. No. 05F4054)

Defendant Michael Allen Hyman appeals from an order revoking his Proposition 36 probation (Pen. Code, § 1210.1 et seq.)¹ and sentencing him to state prison for four years. He contends the judgment should be reversed because the trial court did not have sufficient evidence to conclude that his failure to report to his probation officer was not a drug-related probation violation. Additionally, he argues that the court abused its discretion in refusing to reinstate his probation based on "unusual circumstances." We reject these arguments and shall affirm.

¹ Undesignated statutory references are to the Penal Code.

FACTUAL BACKGROUND

A. Procedural History

On June 9, 2005 (all further calendar references are to that year), defendant was charged with one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and three additional prior prison commitments (Pen. Code, § 667.5, subd. (b)). He was on parole at the time for conspiracy to bring a controlled substance into prison (Pen. Code, § 182, subd. (a)(1)). On August 2, he pleaded guilty to the possession of methamphetamine and admitted one prior prison term.

The trial court suspended imposition of the sentence, placed defendant on Proposition 36² probation for 36 months, and ordered him to participate in a drug rehabilitation program.

On August 15, the district attorney filed a request for revocation of defendant's probation because he missed three appointments with his probation officer and failed to report contact with a law enforcement officer, as required by the terms of his probation.

Following a hearing, the court found that defendant had violated his probation, refused to reinstate probation and imposed the upper term of three years for the methamphetamine

² Proposition 36 was passed by the voters in 2000 and requires that certain nonviolent adult drug offenders be given probation and treatment as opposed to being incarcerated. It is codified in sections 1210, 1210.1 and 3063.1 of the Penal Code and in division 10.8 (commencing with section 11999.4) of the Health and Safety Code.

possession offense and an additional year for a prior prison term (§ 667.5).

B. Evidence Adduced at the Revocation Hearing

1. Violation of probation.

On August 2, after being placed on Proposition 36 probation, defendant reported to his probation officer, Michelle Comstock. During their meeting, Comstock explained the conditions of probation to defendant, including that he was required to report, in person, twice each week and that he was required to report any contact with law enforcement personnel within 48 hours.

On August 3, Officer Comstock went on vacation until August 15 and put her probation department partner, Scott Till, in charge of her caseload. Officer Till testified that it was the office policy to log all probationers who come in to the reception and to tell probationers who are there to see Officer Comstock when she is absent to report to Till instead. Defendant was required to report on August 4, 8 and 11. There was no record of his having reported to the probation office on any of those dates.

Defendant testified that he came to the probation office on August 4 and 8, and was told Officer Comstock was on vacation. He admitted that he did not report on August 11, but claimed it was because he knew Comstock was still on vacation.

On August 6, defendant was stopped by a law enforcement officer for driving erratically. Even though he was driving

without a license, the officer released him without a citation. Defendant failed to report this contact to the probation office.

Defendant testified that he was confused because, under the terms of his parole, he was not required to report a contact with police not resulting in a citation or arrest, and he thought his parole "overrode" probation.

2. Probation report and sentence.

According to the probation report, defendant has a Bachelor of Arts degree from Chico State University and has worked as a laborer and in sales. Prior to this revocation, he had been accepted into a residential drug treatment program. However, he has also been addicted to methamphetamine for 12 years. Defendant has suffered six prior felony convictions, relating to a gambling problem as well as his drug addiction.

The probation report recommended denying probation and imposing the upper prison term of three years, enhanced by an additional year for a prior prison commitment. After reviewing the report and hearing live testimony, the court agreed with the recommendation and imposed the four-year state prison sentence. In pronouncing sentence, the judge stated that defendant's "performance on probation and parole in the past has been pretty much horrible." The court also cited defendant's numerous prior convictions and the fact that he was on parole when he committed the original offense.

DISCUSSION

I. Failure to Report

"A defendant who is on probation pursuant to Proposition 36 can only have that probation revoked in accordance with the terms of the statutory scheme. [Citations.] For such a defendant, Proposition 36 supersedes the trial court's general power to revoke probation under sections 1203.2 and 1203.3. [Citations.] 'Different rules apply depending on whether a defendant violates a non-drug-related or drug-related condition of probation.' [Citation.] 'Anticipating that drug abusers often initially falter in their recovery, Proposition 36 gives offenders several chances at probation before permitting a court to impose jail time. The first time an offender violates a *drug-related* condition of probation,^[3] he is entitled to be returned to probation unless he poses a danger to others. (§ 1210.1, subd. (e)(3)(D) [now subd. (f)(3)(A)].) The second time he violates a drug-related condition of probation, he is entitled to be returned to probation unless he poses a danger to others or is unamenable to treatment. (§ 1210.1, subd. (e)(3)(E) [now subd. (f)(3)(B)].) Only upon a third violation of a drug-related condition of probation does an offender lose the benefit of Proposition 36's directive for treatment instead of incarceration. (§ 1210.1, subd. (e)(3)(F) [now subd.

³ Section 1210.1, subdivision (g) defines "drug-related condition of probation" as "a probationer's specific drug treatment regimen, employment, vocational training, educational programs, psychological counseling, and family counseling."

(f)(3)(C)].) Upon such a violation, the court regains its discretion to impose jail or prison time. [Citation.] *Proposition 36 does not, however, extend the same grace to probationers who violate non-drug-related conditions of probation. The first time a probationer violates such a condition, the court has discretion to incarcerate the person.* (§ 1210.1, subd. (e)(2) [now subd. (f)(2)].)' " (*People v. Dagostino* (2004) 117 Cal.App.4th 974, 987-988, italics added.)

While not contesting the evidence that he failed to report to the probation office, as he was required to do, defendant argues that before the trial court could revoke probation on that ground, there must be evidence in the record that the reporting requirement was not drug related. Relying on *People v. Atwood* (2003) 110 Cal.App.4th 805 (*Atwood*), defendant asserts that if the reason he was required to report was to further his drug rehabilitation, counseling, or for drug testing, then the report violations would be drug related and the court would not have discretion to revoke Proposition 36 probation absent a finding that he was a danger to society.

In *Atwood*, the defendant was on probation following a conviction for transporting heroin. (*Atwood, supra*, 110 Cal.App.4th at p. 807.) She violated her probation by failing to keep a scheduled appointment with her probation officer, as she was required to do, and because she was discharged from her drug treatment program. (*Ibid.*) The failure to remain in drug treatment was undisputedly drug

related. (*Ibid.*) We held that probation could be revoked for the reporting violation only if the People showed that it, too, was not drug related. (*Id.* at p. 808.) Because the record was silent as to the reason for the reporting requirement, we remanded the case to the trial court to determine if the condition was drug related. (*Id.* at p. 813.)

Defendant argues for a similar remand in this case, since the record is silent as to why he had to report to his probation officer.

Had the reporting violation been the only basis for the trial court's revocation order, *Atwood* might be relevant. However, as *Atwood* points out, if *at least one* of the violations was not drug related, probation could be revoked. (*Atwood, supra*, 110 Cal.App.4th at p. 807.) Here, defendant does not dispute that failure to report his law enforcement contact was *not* a drug-related violation. Because it is uncontested that defendant violated at least one non-drug-related condition of probation, *Atwood* does not assist his argument.

II. Abuse of Discretion

While not contesting the sufficiency of the evidence that he violated probation and further admitting he was statutorily ineligible for probation except in "unusual circumstances," (§ 1203, subd. (e)(4)), defendant argues that the court's discretion to send him to prison is not unlimited but must be focused on whether the revocation is "necessary for the

probationer's rehabilitation" and "whether the probationer can be safely returned to society." We disagree.

While the goals of probation are rehabilitative (*People v. Howard* (1997) 16 Cal.4th 1081, 1092), probation is a matter of *clemency*, which can be withdrawn by the court if the terms and conditions are not met. (*In re Solis* (1969) 274 Cal.App.2d 344, 348.)

Section 1203, subdivision (e) states, in relevant part, that: "*Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons:* [¶] . . . [¶] (4) Any person who has been previously convicted twice in this state of a felony" (Italics added.) Because he suffered no less than *six* prior felony convictions, defendant was statutorily ineligible for probation unless the court found "unusual circumstances" in the interests of justice.

Defendant claims unusual circumstances were present in his case because he is well educated, intelligent and capable of obtaining employment. He also contends he had family and community support and was on the path to recovery from his drug addiction, which was the sole cause of his prior troubles with the law.

California Rules of Court, rule 4.413(c) (as renumbered and amended effective January 1, 2007) lists the factors that "may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate." They include that the

fact or circumstance which gives rise to the probation limitation is "substantially less serious than the circumstances typically present in other cases" (rule 4.413(c)(1)(A)); that the defendant has "no recent record of committing similar crimes" (*ibid.*); that the defendant has been "free from incarceration . . . for a substantial time" before the commission of the current offense (rule 4.413(c)(1)(B)); or that he is "youthful . . . and has no significant . . . prior criminal" record (rule 4.413(c)(2)(C)).

These factors clearly militate against reinstatement of probation: Defendant suffered six prior felonies, and was still on parole when the new offense occurred. He is a 32-year-old drug and gambling addict with a lengthy criminal record who committed the new violations very soon after serving a nine-month sentence for a parole violation. As the trial court noted, his record on probation and parole was "horrible."

Notwithstanding defendant's avowed interest in attending the "Good News In Step" substance abuse program, his parole agent, Brian O'Connor, who had dealt with defendant for several years, said that defendant emphatically rejected entry into the program a few months earlier; O'Connor believed that defendant's newfound interest in the program was merely an attempt to avoid returning to prison.

"Our trial courts are granted great discretion in determining whether to revoke probation." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445.) "While [a trial judge] may not act

arbitrarily in either denying probation or in revoking an order granting probation, yet it would require a very strong showing to justify a reviewing court to set aside an order of court either denying probation in the first instance or revoking probation after it was once granted, upon the ground that the judge had abused his discretion." (*People v. Lippner* (1933) 219 Cal. 395, 400; accord, *Rodriguez, supra*, 51 Cal.3d at p. 445.)

The probation report concluded that none of the applicable criteria for unusual circumstances applied in defendant's case. Our review of the record supports that conclusion. The trial judge did not abuse his broad discretion in following the report's recommendation and declining to reinstate probation.

DISPOSITION

The order revoking probation is affirmed.

_____, BUTZ, J.

We concur:

_____, BLEASE, Acting P. J.

_____, NICHOLSON, J.